United States Court of Appeals
For the First Circuit

No. 81-1783

HOME PLACEMENT SERVICE, INC. et al.,

PLAINTIFFS, APPELLANTS,

v.

THE PROVIDENCE JOURNAL COMPANY,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[HON. FRANCIS J. BOYLE, *U. S. District Judge*]

Before

COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

Ralph J. Gonnella, for appellants.
Joseph V. Cavanagh, Jr., with whom *Knight Edwards* and *Edwards & Angell* were on brief, for appellee.

June 18, 1982

ALDRICH, *Senior Circuit Judge*. This action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, is the second against defendant newspaper publisher, Providence Journal Company, for refusal to accept so-called rental information advertising in its classified columns. The first resulted in two decisions of this court, *Walker* v. *Providence Journal Co.*, 1 Cir., 1974, 493 F.2d 82, and *Homefinders of America, Inc.* v. *Providence Journal Co.*, 1 Cir., 1980, 621 F.2d 441, ending favorably to the defendant. The present one is brought by a new, unconnected plaintiff, Home Placement Service, Inc.[1] In the first we held that even though defendant may have had a monopolistic position, it was justified in

[1] Joseph P. Muschiano, president of Home Placement, is also named as a plaintiff. For convenience, we will refer to Home Placement, singly, as plaintiff.

refusing the advertising because of its deceptive nature. Defendant contends that the present case is simply a replay. The district court agreed, and entered judgment for the defendant. Plaintiff appeals.

It is true that the record in the prior case was introduced herein for all purposes, and that the nature of plaintiff's business followed the same format as Homefinders, sometimes known, generally, as Rentex, but there was further evidence, which plaintiff asserted made a substantial difference. Unfortunately, so far as easy disposition of this appeal is concerned, we must label as clearly erroneous the court's finding that plaintiff's new evidence "is a distinction in search of a difference. . . . The respective schemes of Homefinders and Home Placement are, for purposes of this proceeding, indistinguishable." Rather, there were marked differences, requiring, as matter of law, a different result.

Homefinders' "scheme" was to advertise an individual rental with a brief and untraceable description, followed by a telephone number. The number was Homefinders'. The responder would be "told that the property advertised was no longer available, but if the prospective tenant would merely come to Homefinders' office and pay the fee of $20, other listings would be made available." *Homefinders of America, Inc.* v. *Providence Journal Co.*, D.R.I., 1979, 471 F. Supp. 416, 420. Homefinders' advertisement frequently was totally misleading — the property had never been available, indeed, often there never was such; the sole purpose of the ad was to sell the prospect a list of other properties. These further properties, even if available, and some were not, would not measure up to the attractive description in the fictitious advertisement, nor could the prospect discover this until he had made his payment. Disappointment, or worse, was a frequent consequence.

The present plaintiff, also, was endeavoring to sell a list of properties for which it required payment in advance, but there was no misrepresentation as to the availability of, or as

to the description of, the particular item advertised. The statement in defendant's brief that the "ads were similar, if not identical in form, to the ads placed by Homefinders" is not true, either as to availability, or description. The district court had found that Homefinders' ads were "calculated to attract an unusual degree of attention. . . . For example, its advertisements stated that children and pets were welcome, utilities were paid and automobile parking was available." *Id.* This was readily accomplished because, as we said on appeal, the bait was artificial. 621 F.2d, ante, at 444. While plaintiff, also, had as its primary purpose the sale of lists, it did not use deceptive bait, and the court's finding that Home Placement's and Homefinders' schemes "both amounted to bait-and-switch artifices which employed misleading advertising" was an inaccurate equivalency.

As a result of Homefinders' advertisements, defendant received continuous complaints from its readers — defendant's brief described it as a "torrent." In addition to the unavailability of the property advertised, or, after payment, anything similar, readers, as well as the owners themselves, were sometimes put out by the fact that Homefinders listed properties without authority. The totality of complaints was, naturally, upsetting to defendant. It responded by adopting a policy, set forth daily in its classified section, of not knowingly accepting "advertising where a fee is required to obtain rental information," and, when the present plaintiff applied, adhered to it.

We had no difficulty in holding, quite apart from whether the other aspects of the Sherman Act were satisfied — a question we did not reach — that defendant was not required to "immolate itself" by publishing Homefinders' misleading advertisements of which its readers justifiably complained. In the present case plaintiff's was a new business, and was cut off almost immediately. Rather than a "torrent" of complaints, there was not even a trickle.[2] Our first question, ac-

[2] The concluding sentence in this part of the court's opinion, "It

cordingly, must be whether plaintiff's "scheme" was still sufficiently objectionable to warrant the Homefinders treatment.

Defendant has a number of difficulties. Not only were there no actual complaints, but defendant failed to show any basis for any, either that the specific advertised property was false or exaggerated, or that plaintiff engaged in unauthorized listing. There was no evidence that it intended to do so. The substantive difference between plaintiff and Homefinders is analogous to the difference between a retailer who has, and advertises, a so-called lead, or loss-leader, to attract customers who will, hopefully, purchase other articles as well, and one who misrepresents a lead which, in fact, does not exist. The first practice is customary and ethical. The court's finding that "switching to a list of properties ... using as bait an ad for a single [available] property" was deceptive bait-and-switch, would mean that every broker who advertised a single listing, and hoped that if a prospect found he did not like that one he might sell him another, is a bait-and-switcher. This is inconceivable.[3]

It is true that there was evidence that a reader of classified real estate advertisements may expect that there will be no charge to him. The evidence was that in Rhode Island either the advertiser is the lessor himself, or, if a broker, he will be paid by the lessor. Whether, in order to avoid any possible misunderstanding, defendant could reasonably have required that the fee be disclosed in the advertisement was an alternative not proffered by defendant. Its announced policy made it clear that it would not publish plaintiff's ads even with such disclosure. For this it had no valid business reason. Were plaintiff subsequently to succumb, and adopt Homefinders'

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was only a matter of time before the complaints rolled in," must have been an inadvertency for "before the complaints would roll in." Even read as a prognosis, no basis was shown for it.

[3] We note that the FTC's order against Homefinders, *In the Matter of Rentex, Inc., T/A Homefinders*, 1976, 87 F.T.C. 1304, referred to in our prior opinion, did not find the sale of rental information improper as a matter of principle, but was based on the subjective misconduct.

objectionable practices, complaints would follow and defendant could then stop receiving the advertisements. We cannot accept that the sale of rental information is an inherently and unfailingly deceptive practice, or that advertisements for such necessarily engender complaints which affect the good will of the advertising medium.

Nor can we accept defendant's apparently paternal judgment[4] that the public should not have to pay a fee to find housing. This is a matter to be resolved through the workings of the marketplace.[5] Some persons might well prefer to pay a small fee for a genuine list than to have to pay, indirectly, the larger brokerage commission incurred by the lessor. If, on the other hand, the public were to find plaintiff's business unsatisfying, presumably it would die a natural death. Surely no newspaper can be thought to guarantee that everything it advertises is a superlative bargain, or could claim such a standard as an anti-trust defense.

This is not to say that defendant was not, as a newspaper, presumptively free to choose its advertising. Defendant testified, for example, that it would not advertise handguns,

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[4] In a pretrial deposition, defendant gave its reasons for adopting its policy as follows.

> "It was established because we had over these months and over these problems come to a conclusion that if we set up the policy it would be a good thing for our readers and also consistent with our advertisers, and discussed it with people in the business who felt that ordinary normal rental charges are sufficient for the rental agencies to receive commissions or whatever from the renter or the person owning the property, and so forth, and we didn't feel our readers should have to pay on top of the rental for this service. Also, it's apparent to us that a lot of the people who respond to advertising of Homefinders type were those who were easily taken advantage of, people with low income, large families, disadvantaged people, blacks, and so forth, who have trouble finding rentals and would pay the fee for finding rentals because of their problems of finding suitable vacancies."

[5] We have already noted in *Homefinders*, 621 F.2d, ante, at 442, that "[d]efendant is not permitted to act as a protector of the public. . . ."

or acupuncture. Absent special circumstances, it could choose not to carry any particular advertisement or type of advertising. *E.g., PMP Associates, Inc.* v. *Globe Newspaper Co.*, 1975, 366 Mass. 593. The difficulty here is that plaintiff alleged special circumstances. So did Homefinders. We did not reach those circumstances there because, as to that plaintiff, defendant had a legitimate business justification for rejecting the advertisements, and we would not allow Homefinders to "piggy-back on the rights of other parties." 621 F.2d, ante, at 444. Plaintiff here, however, is asserting its own rights. We turn, accordingly, to the anti-trust aspect of the case and, because the court did not reach it here, but did reach it in *Homefinders* and the record is the same, we consider the district court's findings in that case, 471 F. Supp., ante. Basic to its decision was the following.

> "The evidence in the record clearly shows and this Court finds that the Defendant's decision to reject Plaintiff's advertising and to institute its policy not to accept ads from fee-charging firms was not in any way intended to restrain trade or enhance Defendant's own position in the rental information market. Indeed, there is no evidence that Defendant's policy did anything other than reduce its advertising revenues. Rather, it was sound business judgment made at a financial sacrifice, intended to maintain a quality advertising section for its readers." 471 F. Supp., ante, at 422-23.

It was simply not so in *Homefinders*, or in this case, that there was no evidence that defendant's refusal to deal did anything other than reduce its advertising revenues. There was introduced on behalf of Homefinders, and reintroduced on behalf of Home Placement, extensive testimony by a qualified expert that a rental referral business is in competition with a newspaper selling more traditional forms of advertising rentals because it is "removing potential buyers of . . . classified advertising." Since plaintiff lists individual lessors without charge, originally and ultimately, if its service

became favorably known it could siphon off lessors by saving them the cost of defendant's columns. This evidence of direct competition was uncontradicted, and given its logic, there was no basis for rejecting it. What is more, during trial, the court specifically accepted it. It interrupted plaintiff's questioning of its expert by remarking, "We have already established through this witness that [in that case, Homefinders] was competing with the Providence Journal." This is the opposite of the court's later statement that there was no evidence that defendant's foreclosing plaintiff did anything other than reduce its revenues. By this final, totally unsupported, finding, the court improperly undercut plaintiff's entire case.

Complementing the testimony about direct competition was testimony that for rental referral services the classified section of the largest metropolitan newspaper in the area is not only the primary, but the essential medium for survival. It is even required for larger transactions, sales.[6] In the geographical area to which plaintiff appealed, plaintiff's needs were such that the smaller dailies could not be sufficient. This evidence, sniped at by showing certain alleged local exceptions, but otherwise uncontradicted, indicates the simplest form of attempted strangulation of a competitor by refusal to deal. The only question is, did it give plaintiff a case. We hold that it did, under both sections 1 and 2 of the Act.

We believe the court's finding there was no section 1 claim for lack of a contract, combination or conspiracy in restraint

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[6] Thus one of the state's prominent brokers testified,

A. "We have not tried television to sell or rent a specific product or, if we have tried it, it's on a very limited basis, and the same would apply to radio, if and when we have tried it it's been on a very limited basis.

Q. "Why is that?

A. "Well, it's our opinion that the real estate purchasing segment of the public has been trained to do much of their real estate purchasing in the classified section, therefore, we respond to what we feel is the custom of the purchasing real estate public."

of trade, was wrong as a matter of law. Shortly after defendant announced its policy, plaintiff's president, Muschiano, was told, when he called in proposed advertising copy, that plaintiff's advertisements could not be accepted. This, we agree, was in itself unilateral, and permitted by *United States* v. *Colgate & Co.*, 1919, 250 U.S. 300. But matters did not end there. When told plaintiff's ads would not be accepted, Muschiano promised no longer to assess a fee in connection with properties advertised in the Journal, and on that basis, defendant agreed to resume publishing plaintiff's rental advertising.[7] The Court has repeatedly found concerted action present when it could be determined from a course of conduct that retailers agreed, in response to a manufacturer's request, or through coercion, to a manufacturer's conditions of doing business. *E.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 38-46 (discussing cases); *Albrecht* v. *Herald Co.*, 390 U.S. 145. In the present case plaintiff expressly agreed to defendant's condition, viz., not to charge a fee in connection with advertised properties. Indeed, defendant could not readily implement its policy without plaintiff's agreement, it being impossible to tell from the face of an advertisement whether it required the payment of a fee. Since in the absence of defendant's policy, plaintiff would have charged a fee with respect to some of the advertised properties, a combination was formed which, in effect, fixed a maximum price of zero on plaintiff's sale of rental information. This is sufficient concerted action to bring defendant's conduct within the ambit of section 1, as it is settled

[7] The court made no findings in this regard, but these facts are undisputed. Corroborating Muschiano's testimony as to these events, a memo written by defendant's Manager of Classified Advertising states that Muschiano

> "informed me that his organization was no longer going to charge a fee for rental referrals or rental information service."
>
> "I told him at this time he could begin running his rental advertising again."

that a plaintiff can claim an unlawful combination between defendant and itself as of the day it unwillingly agreed to comply with defendant's restriction. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 1968, 392 U.S. 134, 142; *Albrecht* v. *Herald Co.*, 390 U.S., ante, at 150 n.6; *see Parke, Davis & Co.*, 362 U.S., ante, at 45 n.6. Finally, the restraint cannot be upheld as "reasonable" when it served no legitimate business purpose, and tended not to protect, but to destroy, competition. *Cf. Chicago Board of Trade* v. *United States*, 1918, 246 U.S. 231, 238.

While we consider the court erred in holding that section 1 had not been violated, if, possibly, there could be a question of fact here, there can be none with respect to section 2. The evidence fully supported plaintiff's theory, as viewed by the court, that "the Journal was using its dominance in the newspaper advertising market to foreclose competition in the housing vacancy information market." Although the court found defendant lacked monopoly power, the record was to the contrary. To some extent, plaintiff helped to misdirect the court by attempting to prove that defendant monopolized the sale of newspapers and classified advertising throughout the Providence-Pawtucket-Warwick SMSA, an area consisting of much of central and northern Rhode Island, and parts of southern Massachusetts. We tend to agree that even in this larger market the court's finding no monopoly was not supported by the evidence, but there was no need to define either the product, or the geographic market, so broadly.

The relevant market is "the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market." Sullivan, Antitrust 41 (1977). Or, as the Court has put it, "[C]ommodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." *United States* v. *E. I. DuPont de Nemours & Co.*, 1956, 351 U.S. 377, 395. *See generally George R. Whitten, Jr., Inc.* v. *Paddock Pool*

Builders, Inc., 1 Cir., 1974, 508 F.2d 547, *cert. denied*, 421 U.S. 1004. Thus, the relevant product is not all advertising, or even all classified advertising, but merely daily newspaper rental advertising. Defendant offered no rebuttal of plaintiff's substantial evidence, through numerous witnesses, that there was no effective substitute therefor. The court's reference to the alternatives of "radio, television, [and] billboard," overlooked the uncontradicted testimony of experts, and those in the business, that these are effective only for institutional advertising, in conjunction with, but not in substitution for, more specific daily newspaper ads. Nor are weekly newspapers an adequate substitute, precisely because they offer competition only once a week. In short, on the evidence, none of the alternative media identified by the court could be said to be "reasonably interchangeable" with, or competing "on substantial parity" with, the rental columns of daily newspapers.

As for the geographic bounds of the market, the court found that defendant maintained a circulation advantage of 152,379 to 5,846 within the so-called Providence City Zone, consisting of Providence and ten surrounding communities, including Warwick, Cranston, and, significantly, West Warwick, where plaintiff was situated. It has not been disputed, nor could it be, that within this zone defendant had a monopoly over the sale of newspapers. *See Lorain Journal* v. *United States*, 1951, 342 U.S. 143. Correspondingly, though the court did not pass on the matter, the evidence compels the conclusion that defendant had monopoly power in the sale of newspaper advertising for rental units located within the City Zone. The only daily newspapers allegedly competing with defendant for rental listings were smaller, local papers scattered about, mostly outside the City Zone, notably in Pawtucket and Woonsocket, Rhode Island, and Attleboro, Massachusetts. All of these combined accounted for a market share of 25 per cent, compared to the Journal's 75 per cent, in the Providence-Pawtucket-Warwick SMSA. Whatever ad-

vertising competition these locals offered in their respective areas, they were not effectively competing with the Journal, individually or collectively, for the advertisement of property located with the City Zone. Broker and expert testimony confirmed that the owner of property in Providence or Warwick would not consider it a viable alternative to the Journal to advertise exclusively in, say, the Woonsocket Call, or, for that matter, to pay the greater expense of advertising in several, or all, of the locals, when none had any significant readership in the general area where the property was located. That the Journal could hike its classified advertising prices without fear of competition from the locals is reflected by the fact that defendant was charging substantially higher rates for a line of advertising than any of these alleged competitors.

The court's only response, that "there is no evidence to support in any fashion the contention that [the City Zone] is an existing submarket for renter information," misses the point. The purpose of market definitions is not to frustrate anti-trust plaintiffs by requiring the proof of bright lines which do not exist, but is to help identify monopoly power, that is, "the power to control prices or exclude competition." *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S., ante, at 391. The breadth with which one defined the "submarket for renter information" could not possibly hide the fact that within the City Zone, defendant had an uncontested lock on the sale of rental listings. Plaintiff's case is not defeated by showing that some readers outside the City Zone might be interested in renting within it. As plaintiff's expert testified, utilizing the locals to reach these readers would not provide "any meaningful circulation within your market area that you're trying to do business in." It would be "leaving out your primary area of doing business, and trying to hit markets that surround your area of doing business," whereas, with the Journal, "you're hitting your primary market area rather than all of these peripheral areas." Again, this testimony was unrebutted, and, again, there was no basis for disregarding it. In sum, the only reasonable con-

clusion to be drawn from the evidence was that with respect to the sale of rental advertising within the City Zone defendant was a monopolist.

Defendant's second, alternative, line of defense, also adopted by the court, was that whatever monopoly power it possessed had not been used unlawfully. This, too, we find erroneous. As previously discussed, firms such as plaintiff posed a potential threat to defendant's monopoly position. If plaintiff were successful, it could siphon off defendant's advertisers, and essentially redefine the market for the listing of rental information, thereby perhaps forcing defendant to lower its advertising prices. Because of its monopoly over rental listings in the general area where plaintiff was attempting to operate, the Journal's refusal to run ads where a fee was charged put plaintiff out of the rental referral business. We have held that this refusal was not supported by a legitimate business reason. In the absence of such, defendant's use of monopoly power to destroy a potential competitor was a violation of section 2. *E.g., Lorain Journal* v. *United States,* ante; *Gamco, Inc.* v. *Providence Fruit & Produce Building, Inc.,* 1 Cir., 1952, 194 F.2d 484, *cert. denied,* 344 U.S. 817. It makes no difference that defendant's motives may be claimed to have been pure. Specific intent is necessary only when an attempt to monopolize is alleged. *See Times-Picayune Pub. Co.* v. *United States,* 1953, 345 U.S. 594, 626. Lack of bad purpose is irrelevant where the defendant already possesses monopoly power and, without justification, uses it to exclude competition. *United States* v. *Griffith,* 1948, 334 U.S. 100, 105. *Byars* v. *Bluff City News Co.,* 6 Cir., 1979, 609 F.2d 843. We agree with the court in *Byars* that "what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices." *Id.* at 860. When the foreseeable and proximate consequence of defendant's conduct was unreasonably to perpetuate an already existing monopoly by excluding a potential competitor, it would be of no solace to plaintiff, or the consumers the anti-trust laws were designed to protect, that defendant may not have been seeking this result.

Plaintiff sought relief in the form of treble damages, attorney's fees, and an injunction. Further proceedings will be necessary to determine the appropriate form of injunctive relief, if any is needed, and the amount owing in damages and attorney's fees.[8] We add that this is a case where it would be easier all around, including for the judge himself, without any possible reflection on him, to have the further proceedings before another trier. Our reasoning on this subject is set out in *O'Shea* v. *United States*, 1974, 491 F.2d 774, 778-79. This is an automatic rule in some other districts, but, in case it is not in Rhode Island, we so request here.

Reversed and remanded for further proceedings consistent herewith.

[8] We offer no opinion on whether plaintiff's claim for damages might have been waived.

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

HOME PLACEMENT SERVICE, INC. and JOSEPH MUSCHIANO	:	
PLAINTIFFS	:	
	:	C.A.
v.	:	No. 77-158
	:	
PROVIDENCE JOURNAL COMPANY	:	
DEFENDANT	:	

MEMORDANDUM

BOYLE, Francis J., District Judge.

In this action Plaintiff Home Placement Service, Inc. and Joseph Muschiano [hereinafter, Home Placement], charge Defendant Providence Journal Company [hereinafter, the Journal] with violations of Sections One and Two of the Sherman Act. 15 U.S.C. §§ 1, 2 (1976).

Home Placement is a rental referral service. For a fee, Home Placement promises prospective apartment and house tenants that it will provide them, for one year, with a list of available apartments and houses.

The Journal publishes Sunday and daily newspapers which circulate throughout Rhode Island and parts of Connecticut and Massachusetts. The Journal refused to carry Home Placement's advertisements in its papers' classified section. The Journal's announced policy is not to accept any advertisements from companies such as Home Placement, that is, companies which charge prospective tenants a fee for rental information.

Home Placement argues this refusal constitutes an abuse of monopoly power in contravention of Section Two of the Sherman Act. In addition, Home Placement argues that when it acceded to the Journal's policy by no longer charging for rental information, a combination or conspiracy was formed between the Journal and Home Placement in violation of Section One of the Sherman Act. The arguments of Home Placement are without merit.

This action follows upon the heels of an earlier action involving the same Defendant, similar contentions and a different plaintiff, Homefinders of America, Inc. *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980); *Walker v. Providence Journal Co.*, 493 F.2d 82 (1st Cir. 1974).[1] Those actions have essentially similar facts and the parties agree that the record in those actions may be used as the basis for determining this action, with the additional facts that this Plaintiff, Home Placement, did not seek to advertise unavailable property and has no association with the plaintiff in the earlier action, Homefinders of America, Inc.

Both Homefinders and Home Placement provided information through classified advertising in the Journal's newspapers, concerning the availability of residential rental properties. In the case of *Homefinders*, which began its business first in the area of Providence, Rhode Island, some of its ads were deliberately misleading: The ads described property known to be unavailable. When a prospective tenant responded to the ad, he or she was told that the advertised

[1] Walker, plaintiff in the first case, *Walker v. Providence Journal Co.*, was a franchisee of Homefinders of America, Inc. Homefinders later joined the litigation as a plaintiff. When the second case, *Homefinders of America, Inc. v. Providence Journal Co.*, was decided by the Court of Appeals, only Homefinders remained a plaintiff.

property was unavailable, but that for a fee, Homefinders would provide a list of available properties.

The evidence is that Home Placement provided the same type of rental service. The modus operandi of both services was similar. Prospective tenants were charged a small fee. Landlords whose properties were listed paid no fee. Both Plaintiffs advertised particular properties. Both services could not succeed without a high volume of tenant-clients.

Home Placement was organized in March of 1973, in order to provide a Homefinders type of operation. Home Placement's manager, Mr. Muschiano, testified that its purpose was to "run it on the idea of Homefinders." Although, Mr. Muschiano, had available a number of apartments which he himself controlled, the same bait used by Homefinders was used by Home Placement: A prospective tenant who called was told that a list of rental apartments was available for a fee of twenty dollars.

Although the advertisements submitted by Home Placement might have accurately represented actual vacancies, the practice of advertising a single property as available and then switching to a list of properties was not different in either substance or effect from the Homefinders operation. Home Placement was also a scheme to sell a list of rental opportunities for a fee using as bait an ad for a single property.

Home Placement submitted this type of advertisement for no more than two weeks, until the Journal announced its new policy, on April 13, 1973, not to knowingly accept advertisements where a fee is required to obtain rental information. Although during this time the Journal received no complaints concerning Home Placement, this is more probably attributed to the short period of time that Home Placement plyed its trade. It was only a matter of time before the complaints rolled in.

SECTION TWO CLAIMS

Home Placement demonstrates no violation of Section Two. The Sherman Act forbids monopolization and attempts to monopolize. 15 U.S.C. § 2 (1976). Monopoly power, the power to raise prices and exclude competition, is not, without more, violative of Section Two. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Section Two violations have been found, however, where a monopolist abused its position in the market where it competed. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). In order to succeed with its claim, therefore, Home Placement must show both monopoly power and abuse of that power. Home Placement shows neither.

Home Placement has not shown the existence of monopoly power. *Homefinders of America, Inc. v. Providence Journal Co.*, 471 F. Supp. 417, 423 (D.R.I. 1979), *aff'd on other grounds*, 621 F.2d 441 (1st Cir. 1980).

In *Homefinders*, the Plaintiff alleged the relevant product market was the "housing vacancy information market." Plaintiff then argued that the Journal was using its dominance in the newspaper advertising market to foreclose competition in the housing vacancy information market. Plaintiff alleged a cause of action. Unfortunately, Plaintiff did no more: Plaintiff failed to define the housing vacancy information market. Plaintiff failed to introduce evidence defining the market despite the admonition of the Court of Appeals in an earlier episode of the same case. *Walker v. Providence Journal Company*, 493 F.2d 82 (1st Cir. 1974). Plaintiff in *Homefinders* failed to prove a Section Two violation because it failed to define the relevant product market. Inasmuch as Plaintiffs in the case at bar rely on *Homefinder's* record, their claim must fail for the same reason.

Assuming, for argument's sake, the existence of monopoly power, Home Placement has not proved its case, *i.e.*, it has not shown the requisite "bad conduct." Home Placement points to the Journal's alleged monopoly power and argues that the Journal's refusal to deal, without more, is violative of the Sherman Act. This argument is congruous with neither logic nor law.

The propriety of the Journal's refusal rests on firm ground: it sought to minimize the chance it would run afoul of the law or harm its reputation. In other words, its refusal was a reasonable business decision.

The decision of the Journal not to publish advertisements such as those involved here was not made in a vacuum. As discussed earlier, the Journal previously ran similar advertisements which resulted in customer complaints. In *Homefinders*, Plaintiff, a business similar to Home Placement, was refused space in the Journal's classified ad section after the Journal received complaints from its subscribers. The Journal decided this type of advertisement possessed too great a potential for misrepresentation with concomitant exposure to liability and disadvantageous publicity. The Journal thereafter refused advertisements from all those who would charge for rental information.

Home Placement argues *Homefinders* is distinguishable. It argues that unlike Homefinders, which advertised unavailable properties, it did not. This is a distinction in search of a difference. As stated earlier, the respective schemes of Homefinders and Home Placement are, for purposes of this proceeding, indistinguishable. Both amounted to bait-and-switch artifices which employed misleading advertising. It goes without saying that, monopoly by power or not, the Journal will not be compelled to further a fraud on the marketplace. *Homefinders*, 471 F. Supp. at 422-23.

Consequently, the Journal's refusal does not violate Section Two.

SECTION ONE CLAIMS

The Sherman Act forbids contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C. § 1 (1976). After the Journal announced its policy, Plaintiffs acquiesced, that is, Plaintiffs stopped charging prospective tenants for rental information. Plaintiffs argue this acquiescence formed the requisite combination or conspiracy for a Section One violation. The Journal's refusal was unilateral; there was no combination or conspiracy. *Homefinders*, 471 F. Supp. at 421-22, *aff'd on other grounds*, 621 F.2d 441 (1st Cir. 1980). *Compare United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) *with Albrecht v. Hereld Co.*, 390 U.S. 145, 150 n.6 (1968) *and United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).[2]

Accordingly, judgment is entered for the Journal for costs.

FRANCIS J. BOYLE,
UNITED STATES DISTRICT JUDGE

September 24, 1981.

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[2] Plaintiffs point to footnote six of *Albrecht* in support of their claim. *Albrecht* is inapposite. In *Albrecht* the defendant sought to maintain resale prices, a *per se* violation of Section One. No allegation of price fixing is made in the case at bar.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND

KEITH WALKER, d/b/a HOMEFINDERS,	)	
	)	
Plaintiff	)	
	)	CIVIL
v.	)	ACTION
	)	No. 5133
THE PROVIDENCE JOURNAL COMPANY, ET ALS.	)	
	)	
Defendants	)	

OPINION

September 6, 1973

DAY, District Judge. In this civil action the plaintiff seeks damages and declaratory and injunctive relief against seven defendants. The defendants named in the plaintiff's lengthy complaint are The Providence Journal Company; George Bellano, individually and in his capacity as director of advertising for the Providence Journal Company; The Better Business Bureau of R. I. Inc.; John Aiello, individually and as operations manager of The Better Business Bureau of R. I. Inc.; Rhode Island Consumer's Council; Edwin T. Palumbo, individually and in his capacity as director of said Rhode Island Consumer's Council, and Albert West, individually and in his capacity as director of the Rhode Island State Department of Business Regulations.

In his complaint, which was filed on March 6, 1973, the plaintiff alleges that he operates a home rental information service in the State of Rhode Island under the name of

"Homefinders" for which he charges subscribers thereto an annual fee of twenty dollars ($20). He further alleges that he placed advertisements of the availability of his services in the newspapers of the defendant, The Providence Journal Company, from August 4, 1972 until January 31, 1973, except for a period of suspension in September, 1972, and that on February 1, 1973, he was advised by said defendant that his advertisements would no longer be accepted and that his classified advertising contract was cancelled.

Plaintiff claims that said refusal to publish his advertisements was in furtherance of a conspiracy by the defendants to lessen competition and constitutes a *per se* violation of 15 U.S.C. § 1 and alternatively a violation of 15 U.S.C. §§ 2, 13 and 18.

This action is before me at this time on the prayer of the plaintiff for a preliminary injunction enjoining the defendant, The Providence Journal Company, from refusing to accept the classified advertisements of the plaintiff and from otherwise engaging in acts or practices in violation of 15 U.S.C. § 1, 15 U.S.C. §§ 2, 13 and 18 and 42 U.S.C. § 1985, and various Amendments to the Constitution of the United States. At the conclusion of the hearing on said prayer for a prelminary injunction, I reserved decision pending the filing of memoranda by counsel for the plaintiff and the defendant, The Providence Journal Company.

At the outset of said hearing counsel for the plaintiff stated that the named plaintiff, Keith Walker, is no longer the plaintiff herein, having left Rhode Island, and that Larry Glist of Denver, Colorado and Ronald Phares of Baltimore, Maryland should be substituted as proper parties plaintiff, pursuant to Rule 25(c) of the Federal Rules of Civil Procedure. No formal substitution of parties has been entered in the record of this action.

The evidence adduced during said hearing establishes that on August 1, 1972, the plaintiff and Homefinders of America, Inc., a Colorado corporation with offices in Denver, Colorado, executed an agreement under which said Homefinders of America, Inc. licensed him to use the designation "Homefinders of Providence" and the right to offer listings of available real estate rental properties to the public exclusively in the Counties of Providence and Kent, in the State of Rhode Island. Said agreement was for a period of one (1) year from the date thereof. Said agreement provides that: "Licensee shall upon termination of this agreement, desist from any further use of said trade-name or designation and upon termination of this agreement, the license granted by the Company to Licensee hereunder shall immediately terminate."

The evidence also establishes that on April 28, 1973, the plaintiff, Keith Walker, left Rhode Island and abandoned the license granted to him under said agreement, and his interest therein was promptly terminated by said Homefinders of America, Inc. There is no provision in said agreement authorizing the transfer of said license to any other licensee. Neither is there any provision therein for the reversion of any interest therein to the Licensor. Said agreement carefully avoids placing any post-termination obligation on the licensor, Homefinders of America, Inc. and expressly states that upon termination of said agreement the license created by the agreement "shall immediately cease and terminate."

It is undisputed that Keith Walker, the named plaintiff, no longer has any interest in the business he conducted under said license agreement. Injunctive relief operates prospectively only, and since the injunctive relief sought herein is to protect the business formerly conducted by him in which he no longer has any interest, he clearly has no standing to seek injunctive relief to protect that business. Mendez v. Bowie, 118 F. 2d 435, 439 (1st Cir. 1941), *cert. denied*, 314 U.S. 639 (1941).

As hereinbefore recited, counsel representing the plaintiff at said hearing contended that under the provisions of Rule 25(c) of the Federal Rules of Civil Procedure, this action may proceed in the name of Keith Walker and that injunctive relief may be granted. Rule 25(c) provides in pertinent part as follows:

> (c) *Transfer Of Interest.* In case of any transfer of interest the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. . . ."

It is well settled that said Rule 25(c) governs procedural matters only and does not provide a substantive basis for the standing of Keith Walker or anyone else to seek the preliminary injunction sought in this action. Aluminum Extrusion Company v. Soule Steel Company, 260 F. Supp. 221 n.5 (C.D. Cal. 1966).

Since Keith Walker now has no standing to seek a preliminary injunction, injunctive relief may not be granted unless it appears from the record herein that there is a party before this Court who does have a right to maintain this action as the assignee of said license. As hereinbefore recited, counsel for the named plaintiff contended that Larry Glist and Ronald Phares, officers of said Homefinders of America, Inc., have standing to maintain this action and seek injunctive relief. There was no evidence presented during said hearing of a transfer by Keith Walker of his interest in said license to either of them. Since the said Larry Glist and Ronald Phares have no interest in said business formerly operated by Keith Walker, they have no standing to seek an injunction to protect said business.

In his memorandum filed after said hearing, counsel for the plaintiff abandoned his contention that said Larry Glist and Ronald Phares had standing to seek injunctive relief, and

now contends that said Homefinders of America, Inc. should be substituted as the party plaintiff herein. In my opinion this contention is likewise without merit. There is no provision in said license agreement authorizing the transfer of said license to any other person. Similarly, there is no provision therein for the reversion of said license to said Homefinders of America, Inc. Said agreement carefully avoids the imposition of any post-termination liabilities upon said Homefinders of America, Inc. and expressly states that upon the termination thereof the license created by said agreement "shall immediately cease and terminate."

When said license agreement between Keith Walker and Homefinders of America, Inc. was terminated by the latter, any relationship between the parties thereto ceased to exist as did the license which had been granted to the said Keith Walker.

In my opinion there is no proper plaintiff before this Court in this action. Accordingly, said prayer for preliminary injunctive relief against the defendant, The Providence Journal Company, must be and it is denied.

s/ EDWARD W. DAY
District Judge

Keith WALKER, d/b/a Homefinder's,
Plaintiff, Appellant,

v.

PROVIDENCE JOURNAL COMPANY et al.,
Defendants, Appellees.

No. 73-1308.

United States Court of Appeals,
First Circuit.

Argued Dec. 5, 1973.

Decided Feb. 27, 1974.

Rehearing Denied March 14, 1974.

A franchisee of a housing vacancies information service brought an action against a newspaper publisher in which he claimed that the newspaper had sought to eliminate competitors to its classified advertising section by refusing to deal with him. When the franchisee ceased doing business and left the jurisdiction before a hearing on his prayer for a preliminary injunction, his franchise having been cancelled, the United States District Court for the District of Rhode Island, Edward William Day, J., dismissed the prayer for preliminary relief on the ground that there was no proper plaintiff before the court, and the franchisee appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that the franchisor, although it was not a party to the action, retained sufficient interest in the litigation as the franchisee's successor that dismissal of the action for lack of proper party plaintiff was not warranted, but that the dismissal was nonetheless merited on the basis that no combination or conspiracy in restraint of trade or attempt to monopolize the market for information about housing vacancies had been shown.

Order denying preliminary injunction affirmed.

Ralph J. Gonnella, Providence, R.I., with whom Hodosh, Spinella, Hodosh & Angelone, Providence, R.I., Max D. Stern, Stern & Shapiro, Boston, Mass. and Anthony F. Pennacchia, Providence, R.I., were on brief, for appellant.

Knight Edwards, Providence, R.I., with whom Edward F. Hindle, Jonathan E. Cole, Edwards & Angell, Michael DeFanti, Hinckley, Allen, Salisbury & Parsons, Providence, R.I., Richard J. Israel, Atty. Gen., and Dorothy A. Carr, Special Asst. Atty. Gen., were on briefs, for appellees.

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

Homefinders of America, Inc. (Homefinders), a corporation with a primary place of business in Denver, Colorado, is engaged in the business of licensing or franchising independent businessmen in various states and Canada to use the Homefinders trademark and its distinctive method of providing information about housing vacancies. Keith Walker, the plaintiff, was the franchisee for Rhode Island.

Walker brought suit in the district court on March 5, 1973, alleging that the Providence Journal Co. (Journal), publisher of the only statewide morning and evening newspapers (which held at least two-thirds of all newspaper readership in the state) had violated the antitrust laws, 15 U.S.C. §§ 1 and 2, by attempting to fix the price Walker could charge for his service,[1] by refusing to deal with him, and by attempting to monopolize the market in rental information services by eliminating competitors to the classified advertising section of the papers. Walker sought preliminary and permanent injunctive relief and treble damages. This appeal is from the

[1] The paper allegedly attempted to fix a price of zero by conditioning advertising on Walker's agreement to accept no payment from prospective tenants.

court's denial, after hearing, of a preliminary injunction upon the ground that there was no proper plaintiff before the court. We affirm, but for different reasons.

Walker commenced business in Rhode Island during 1972. Following the Homefinders format he sold for $20 a "policy" entitling its holder to use for a period of one year the services of Homefinders operations throughout the United States. A policy holder was granted access to listings of vacancies classified according to the requirements of different clients; the listings were in catalogues permitting selection by location, price range, landlords' willingness to take children, pets, etc. The office would supply this listing information upon telephoned or personal inquiry.

Walker culled many but not all his listings from classified newspaper ads. In turn Walker advertised his service in newspapers, primarily those of the Journal. Walker and the Journal signed a one-year classified advertising contract, which provided for a number of such ads daily. These ads were alleged to be crucial to the business in two ways: they attracted customers to buy Homefinders' policies, and they attracted owners to list their vacancies with Homefinders.

After Walker began advertising in the papers several agencies[2] received complaints about Walker's service and forwarded them to the Journal. The Journal cancelled the advertising contract, but shortly thereafter reinstated it and the advertising continued until January 31, 1973. On February 1, 1973, the Journal wrote to Walker that it would take no more ads; it simultaneously cancelled the advertising contracts of

[2] These agencies, and their directors, have also been named as defendants. They include the Better Business Bureau, the Rhode Island Consumer's Council, and the Rhode Island State Department of Business Regulations. The Consumers' Council was dismissed by stipulation because it possessed sovereign immunity; a motion to dismiss filed by Edwin P. Palumbo, director of the Council, has been denied.

two other firms in Rhode Island then providing rental listing services for which they charged prospective tenants.[3] The letter of cancellation recited that the new policy was for the benefit of both the Journal and its readers.[4] Attempts to negotiate a new format for the ads proved futile, although Walker allegedly offered to cast the ads in any nondeceptive form acceptable to the Journal and accurately describing the service rendered. Plaintiff claims that the Journal refused such offers.

The hearing on Walker's prayer for preliminary injunction was had on May 10 and 11, 1973. Although his counsel appeared, Walker himself did not attend. Counsel revealed that, approximately two weeks prior to the date of the hearing (although about three months after the Journal had stopped running Walker's ads and two months after the complaint had been filed), Walker had closed his doors and left the state. His franchise with Homefinders had thereupon, under its terms, been cancelled. Counsel stated that the litigation would go forward in the interest of a Mr. Glist, the president and principal stockholder of Homefinders, and of another stockholder. Later during the hearing, through statements of counsel and testimony of Glist himself, it was developed that Homefinders, after discovering Walker's default, had named Charles R. Campbell, the Boston licensee, to operate the

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[3] One of the other firms changed its form of operation and began to collect a fee from landlords rather than prospective tenants; its advertisements have been reinstated.

[4] There was no specific indication that new complaints about Walker's service had led directly to the cancellation. Plaintiff claimed at oral argument that only five among Rhode Island's approximately 6,000 policyholders are known to Homefinders to have complained. It has been intimated that termination might be related to the criminal prosecution initiated against Walker's alleging that he acted as a real estate broker without a license. A similar prosecution in Maryland was dismissed. *Real Estate Commission v. Phares*, 268 Md. 344, 302 A.2d 1 (1973).

Rhode Island franchise temporarily. Campbell, however, had soon withdrawn, having found the cost of servicing existing policies[5] to exceed any income that could be attracted without newspaper advertising, and having also found that without advertising it was difficult to attract the landlord listings necessary to furnish service to policyholders. Glist testified to Homefinders' continuing desire to operate or license a Rhode Island franchise whenever it became possible to advertise.

At the hearing plaintiff's counsel took the position that Walker was no longer a party. But he insisted that F.R.Civ.P. 25(c) provided for a "substitution" of parties, and that Walker's interest in an injunction had been "transferred" to Homefinders. When the hearing ended it was unclear whether Homefinders or Glist meant to intervene formally.

Twenty days after the hearing, but three months before the district court rendered its decision, plaintiff's counsel filed two affidavits. One was from Walker, then residing with his wife's family in Arizona, asserting his intention to continue as plaintiff and a desire to return to run the Rhode Island franchise, but only if financially able. The other was from Homefinders, stating that it had notified Walker that the Rhode Island franchise rights would be granted to him when and if "the franchise commences to operate again", and stating an intention to retain Walker's attorneys to litigate this case. Homefinders did not, however, move to be substituted or to join as a plaintiff (nor was joinder ordered by the court). In an amended complaint filed with leave in June, 1973, Walker carried on as the sole plaintiff.

The district court on September 6, 1973, dismissed the prayer for preliminary relief against the Journal after an

[5] Walker had not made any refunds to the policyholders before his sudden departure from Rhode Island and may have left other debts. These facts may explain both Campbell's and Homefinders' reluctance to become formally identified either with the Rhode Island franchise or this litigation.

opinion which ended with the somewhat enigmatic statement that there is "no proper plaintiff before the court in this action." Although that ground, standing alone, might suggest that the entire action should be dismissed, the ruling related solely to Walker's standing to seek a preliminary injunction. There is no indication that the court meant to foreclose Walker's claim for damages or even, to the extent different facts might later be developed, his prayer for a permanent injunction. And because a more complete picture may yet be developed, our own present opinion, relating solely to the record as it now stands, should not be read to preclude the district court from reaching other conclusions concerning the interests and intentions of Walker (and Homefinders) should an expanded record warrant them.

But for present purposes, and on the existing record, we disagree with the district court's conclusion, as we understand it, that preliminary relief had to be denied for want of a showing that there was a proper plaintiff. Although we think there are other reasons to deny preliminary relief, it should not have been denied on the ground stated.

[1] An antitrust defendant does not necessarily avoid injunctive relief because it succeeds in driving a proper plaintiff out of business before the court has time to rule on a request for an injunction. Even though he is not currently conducting business in the market allegedly encumbered with the illegal conduct, an aggrieved party may retain a sufficient interest to seek and obtain injunctive relief against a violation of the antitrust laws. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), on remand 418 F.2d 21 (7th Cir. 1970), rev'd on other grounds 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). He "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Id.* at 130, 89 S.Ct.

at 1580. In Bus Employees v. Missouri, 374 U.S. 74, 78 (1963), it was held that even though the acts complained of no longer had a direct injurious effect, plaintiff could still seek an injunction where the dispute remained unresolved[6] and there was "not merely the speculative possibility of ... some future ... dispute, but the presence of an existing unresolved dispute...."

It is true that the genuineness of Walker's desire to return to the market from which the Journal's conduct allegedly drove him is questionable. As for Walker, the alleged injury may be complete rather than continuing, thus rendering a preliminary injunction inappropriate as to him. While Walker asserted by affidavit a qualified intention to return to Rhode Island, we cannot say the district court was found to believe him.

[2,3] Homefinders, however, remains subject to current injury from the alleged antitrust violation. As a transferee of Walker's interest in the Rhode Island market, its position undergirds Walker's. *See* F.R.Civ.P. 25(c). When the original complaint was filed Walker was still transacting business;

[6] Our case of Mendez v. Bowie, 118 F.2d 435 (1st Cir.), cert. denied sub nom. Rios v. Bowie, 314 U.S. 639, 62 S.Ct. 76, 86 L.Ed. 513 (1941), is not to the contrary. Plaintiff sought an injunction against and damages for trespass to land, but sold the land after commencement of the suit. We held that the action for damages, but not for an injunction, survived the sale. However, plaintiff in *Mendez* sold his entire interest in the land; Walker and Homefinders filed affidavits indicating at least a conditional desire by Walker to resume the Rhode Island franchise and Homefinders' willingness that he do so. Moreover, plaintiff's sale did not deprive the buyer of standing to seek an injunction; we pointed out that it was "apparent ... that the purchaser of [the land] does not wish to become involved in this litigation...." Homefinders, by way of contrast, does want to participate and actively supports the relief sought. Homefinders and, more marginally, Walker have a continuing interest in the injunctive claim, whereas only the buyer had such an interest in *Mendez*.

although during the pendency of the action the Walker franchise "terminated" and was not "assigned" to Homefinders, Homefinders, as franchisor, automatically reacquired the rights it had ceded to Walker. It came again to possess the right to place or operate a franchise in Rhode Island. Homefinders, furthermore, was obligated, through its remaining franchisees, to service the policies. When the agreement was terminated, Walker was required to turn all his books and records over to Homefinders and Homefinders was entitled to use a $20,000 reserve fund, established by the agreement, to service Walker's policies, and to charge Walker for any additional sums expended in so doing.[7] Finally, once Homefinders succeeded to the right to conduct or relicense the Homefinders operation in Rhode Island, it also found itself saddled with the same burden borne by Walker—the inability to advertise the business in the Journal.[8]

[4] Rule 25(c) provides that in case of any transfer of interest the action may be continued by the original party unless the court upon motion directs substitution or joinder. Homefinders should have moved for joinder, but its mere failure to do so was not fatal. *See* 3B Moore's Federal Practice ¶ 25.08. Homefinders has made known its interest in carrying forward the litigation. We would feel differently had

[7] The fact that Homefinders has, instead of using these options, left the policyholders to shift for themselves without either service or refunds might militate against the grant of equitable relief, but it would not undermine Homefinders' standing to seek it.

[8] Homefinders' desire to enter the market is not so "speculative" that injunctive relief becomes inappropriate. Homefinders, through its franchisee, has already been a participant in the market and is therefore even more closely connected to it than was the plaintiff in *Zenith*, *supra*. Cases cited by the Journal such as Holiday Inns of America, Inc. v. B & B Corp., 409 F.2d 614 (3d Cir. 1969), are inapposite; they are trademark cases rather than antitrust, and involve plaintiffs with no past or current connection with the subject market. *See Id.*, at 618 n.13.

the district court on reasonable terms ordered Homefinders to join, and had Homefinders declined.[9] The court could have forced Homefinders either to join or forfeit any further claim of interest in the litigation. But it did not do so and, under Rule 25(c), Homefinders must be counted in determining whether there is a "proper plaintiff before the court."

Walker and Homefinders together possess the totality of rights, duties and expectations concerning the operation of a Homefinders business in Rhode Island. These present interests, combined with the alleged past injuries, provided adequate standing to seek the issuance of injunctive relief should it otherwise have been appropriate.

[5] While there was thus a showing of standing and interest sufficient to seek a preliminary injunction against the alleged antitrust violations, it does not follow that the district court erred in withholding relief, nor that we should direct that an injunction be entered. A plaintiff urging us to adopt such a course, notwithstanding the district court's failure to reach its legal claims, has to show that, on the record as developed in the district court, it is virtually certain to prevail. Automatic Radio Mfg. Co. v. Ford Motor Co., 390 F.2d 113 (1st Cir.), cert. denied 391 U.S. 914, 88 S.Ct. 1807, 20 L.Ed.2d 653 (1968). It has not made such a showing.

[6,7] Plaintiffs urge that the Journal has violated both §§ 1 and 2 of the Sherman Act. The § 1 claim fails because the record in this case does not disclose the presence of a "combination or conspiracy"; it appears, instead, that the Journal has acted on its own. Since a corporation cannot conspire with its own employees, Joseph E. Seagram & Sons, Inc. v. Hawaiian

[9] Under Rule 21 the court on its own initiative could have ordered the joinder of Homefinders. It should do so. Homefinders ought not to be permitted to occupy its present ambiguous role as a kind of nonlitigant litigant. 3A Moore's Federal Practice ¶¶ 21.04 [1] & [2]; Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir.), cert. denied 313 U.S. 559, 61 S.Ct. 835, 85 L.Ed. 1520 (1941).

Oke & Liquors, Ltd., 416 F.2d 71, 82-84 (9th Cir. 1969), cert. denied 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970), plaintiff must search elsewhere for a plurality of actors pursuing a "joint [and] collaborative" policy. United States v. General Motors Corp., 384 U.S. 127, 145, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). The only other named defendants in this case have, so far as the record discloses, done no more than forward to the Journal complaints about Walker's service. They have not embarked with the Journal upon a joint course of conduct. Nor is Walker helped by his imaginative theory that the Journal collaborated with Walker because, when the Journal refused to accept Walker's ads, Walker ceased advertising. Although the conspiracy requirement of § 1 may have faded enough over the years to include even conspiracies with unwilling coconspirators, *see* Albrecht v. The Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), and conspiracies with customers, United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), the doctrine is not yet so chimerical that the *refusal* of one party to deal or agree further with another can be construed as an agreement.

[8] This leaves only the § 2 theory that the Journal was attempting to monopolize the Rhode Island market in "informational services." This market presumably refers to the market for information about housing vacancies; we say presumably because plaintiffs have made no attempt to define the market, and have made no proof that the Journal has anything approaching a monopoly in it. Such careful definitions and proof are indispensable in antitrust actions. It may be that, utilizing the theory of United States v. Otter Tail Power Co., 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), plaintiffs will be able to demonstrate that the Journal

has used an alleged monopoly in the newspaper or advertising markets to attempt to establish a monopoly in the market for vacancy information. *Cf.* Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951). But we cannot say that plaintiff demonstrated on the record before the district court such a likelihood of success on the merits as would have required the issuance of a preliminary injunction.

Order denying preliminary injunction affirmed.

HOMEFINDER'S OF AMERICA, INC. and Keith Walker, d/b/a Homefinder's, Plaintiffs,

v.

PROVIDENCE JOURNAL COMPANY et al., Defendants.

Civ. A. No. 5133.

United States District Court,
D. Rhode Island.

June 8, 1979.

Rental referral firm brought suit against newspaper company and others, alleging that the newspaper's refusal to accept the firm's advertising violated antitrust laws and seeking damages and equitable relief. The District Court, Francis J. Boyle, J., held that: (1) the newspaper's action in rejecting plaintiff's advertising and in establishing a policy not to accept advertising from rental referral firms which charged fees to prospective tenants was not a combination in restraint of trade in violation of the Sherman Act; (2) the actions of the newspaper fell squarely within the rule that, in absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict a business person's right to exercise discretion as to parties with whom he will deal; (3) plaintiff failed to establish the element of joint action required by the Sherman Act; (4) the alleged combination did not in fact unreasonably restrain trade, and (5) the evidence did not support plaintiff's contention that the newspaper had monopoly power over the renter information market.

Complaint denied and dismissed.

OPINION AND ORDER

FRANCIS J. BOYLE, District Judge.

This is an action in which Plaintiff, Homefinder's of America, Inc., seeks damages and mandatory equitable relief against Defendant Providence Journal Company, its Director of Advertising, George Bellano, and so-called nominal Defendants John Doe and Jane Roe, described as customers of Plaintiff and Defendant Providence Journal Company whose present identities are unknown. Plaintiff's Complaint is based upon Sections 1 and 2 of the Sherman Anti-Trust Act of 1890, 15 U.S.C. §§ 1 and 2. The action was heard on a second Amended Complaint on its merits following denial of a preliminary injunction. *Walker v. Providence Journal Company*, 493 F.2d 82 (1st Cir. 1974).[1]

There is a total absence of evidence aimed at implicating the individual Defendants and in accord with Plaintiff's concession at oral argument as to the individual Defendants, judgment will enter in their favor for costs.

The basis of this action is the refusal of Defendant, Providence Journal Company, hereafter Defendant, to accept Plaintiff's advertising for publication in its newspapers concerning available rental housing vacancies, and the adoption by Defendant of a policy declining to accept any advertising for publication where a fee is required of prospective tenants in order to obtain rental information.

Plaintiff in substance contends a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by reason of the acquiescence of two firms, other than Plaintiff, who furnished rental information for a fee, in the policy of Defendant to refuse to publish advertisements, as a *per se* violation or a vio-

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[1] Plaintiff Keith Walker's action has been dismissed for failure to respond to discovery requests.

lation of the "rule of reason."[2] Additionally, Plaintiff alleges violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, claiming that Defendant monopolizes and, also, attempts to monopolize the renter information service market by means of its strategic dominance over the daily newspaper market in the relevant geographic area.

In addition to testimony presented at an extended hearing, the Court has also considered as evidence testimony submitted in connection with a hearing on Plaintiff's prayer for preliminary injunction on May 10 and 11, 1973 and portions of depositions designated by counsel. The Court makes the following findings of facts and conclusions of law:

Plaintiff is a Colorado corporation created in 1971. In 1976, its name was changed to Pacific-Atlantic Development Co., Inc. Initially, it operated a rental information service at Denver, Colorado. It collected information concerning available rental properties, listed the information and sold the information to prospective tenants for a fee. Landlords were permitted to list their properties without charge. Prospective tenants purchased a contract or policy from Plaintiff—valid for a year. The information collected by Plaintiff was then made available to the prospective tenant. Plaintiff later sold its operating business and has not itself directly participated in that business since that time. Rather, Plaintiff began the business of franchising its method of doing business. It succeeded in contracting with franchisees throughout the United States, in parts of Canada, and Australia. In general, Plaintiff provided its franchisees with instructions in its method of providing renter information and provided assistance in the

[2] Plaintiff has additionally moved to amend the second Amended Complaint to add as co-conspirators two individuals, the Board of Realtors, the customers of Plaintiff, the customers of Defendant, and real estate brokers who comply with Defendant's policy. Additionally, five Defendants were eliminated as Defendants by amendment.

actual operation of the franchise, including accounting services and advertising advice for a percentage of the franchisee's gross income.

On August 1, 1972, Plaintiff entered into a franchise agreement with one Keith Walker, who was then an employee of another franchisee, whereby Walker was granted an exclusive license to offer listings of available real estate limited to Providence and Kent Counties in the State of Rhode Island. The agreement was terminable by either party upon 30 days written notice and upon termination the franchisee was required to immediately transfer to Plaintiff all outstanding and current listings, customer records, documents, books of account and all other records relating to the operation of the franchise, and all mail. Upon termination, the franchisee was required to furnish services to customers for a period of one year. Upon the franchisee's failure to continue to provide services for a period of one year, the Plaintiff was authorized to expend a reserve account of up to $20,000 to honor franchisee's commitments. The reserve account was created by a charge of 5% on gross sales until the reserve account, retained by Plaintiff, amounted to $20,000.

Plaintiff at the time of trial was not engaged in any rental information service anywhere. It now operates a check cashing service in Denver, Colorado. The reason assigned for its withdrawal from the rental information business was a Federal Trade Commission Consent Order which Plaintiff found difficult to supervise and which, it was testified, could have subjected Plaintiff and its officers to personal liability. *In the Matter of Rentex, Inc. T/A Homefinders of America, etc., et al.*, 87 F.T.C. 1340 (May 25, 1976).

Although Plaintiff now asserts that, if it is successful, it will revive its business at Providence, Rhode Island, this assertion is contrary to Plaintiff's explanation of the purpose of this litigation stated in its weekly newsletter to dealers published shortly after this litigation was commenced. It stated:

THE LAWSUIT IN PROVIDENCE:

The situation in Providence is as follows. First of all, our attorney, Mr. Tony Pennacchia, has suggested that since Mr. Walker has left we should not reopen the Providence office and that we should not service the accounts in the Providence area. I am sure this seems a great deviation from our normal policy; however, Mr. Pennacchia's reasoning is that there will be a certain amount of consumer protest due to the fact that no dealer is in Providence to service the local accounts. Our firm in the lawsuit and litigation against the Providence Journal will seize upon this situation to blame the newspapers for, in fact, our inability to service these accounts. In other words, we are alleging in our lawsuit that not only has the company suffered irreparable harm by the newspaper's actions and not only has Mr. Walker suffered irreparable harm from the newspaper, i.e. he went out of business, but also the consumers in the Providence area who have contracted with us for our services are also individually and collectively suffering damages which will be laid to blame directly upon the action of the newspaper's refusing to run our advertising. We feel that by blaming the newspaper for this action this tends to strengthen our position that the newspaper is a monopoly and a defacto public utility who can create great harm and damage upon not only a firm and its employees per se, but also a community at large. Consequently, at this time we will not replace the dealer in Providence and the Providence accounts will go unserviced. This should not cause great hearm (sic) to our reputation since, as you know, each of you will soon be changing to the use of Rentex and whereas it is contrary to our normal code of ethics of operation, I believe Mr. Pennacchia's point is well taken and this action could ultimately serve to benefit the company and possibly the consumer.

The Court cannot accept as fact Plaintiff's assertion that, if successful in this action, it will revive its renter information service in the Providence area. In addition to the fact that the F.T.C. order of May 25, 1976 will severely curtail Plaintiff's modus operandi, it appears that it is now engaged in only two businesses, check cashing and this litigation. Its representations concerning future operation are not credible.

Plaintiff seeks damages for Defendant's past refusal to accept its advertising and seeks to compel Defendant to accept its advertising in the future. Plaintiff cloaks its demands under the provisions of an Act of Congress adopted in 1890, which sought to prevent combinations or intentional action designed to eliminate or limit freedom of economic opportunity. This legislation recognized the need to insure conditions of free competition in a society constitutionally endowed with a considerable degree of opportunity of choice. It is Plaintiff's argument that while it may advertise as it chooses, Defendant lacks the choice of declining to print that which Plaintiff wishes to publish. Plaintiff would have this Court ignore the probable effect of Defendant's publication of Plaintiff's advertisements. In mildest terms, the nature of Plaintiff's advertising is misleading. It sought to notify the public, not of the qualities and virtues of its service, but of the alleged availability of particular properties. At first blush, this seems to be inconsistent with Plaintiff's own interest, since the commodity which it had for sale was information concerning the availability of certain properties which would be disclosed only upon the payment to Plaintiff of its fee. In fact, the purpose of this advertising eminently served Plaintiff's purpose. It inserted advertisements which were calculated to attract an unusual degree of attention, indicating that properties were available for rent under circumstances that were, to say the least, unusual. For example, its advertisements stated that children and pets were welcome, utilities were paid and auto-

mobile parking was available. Complaints concerning this type of advertising establish without doubt that it is what has been called "bait" advertising. When the prospective tenant called the listed telephone number, it turned out to be Plaintiff's telephone and the exuberant prospective tenant was told that the property advertised was no longer available but if the prospective tenant would merely come to Homefinder's Office and pay the fee of $20, other listings would be made available. In some instances, it is admitted, properties were advertised by Plaintiff without the knowledge or consent of the owner, and in terms quite different from those which the owner had in mind.

Plaintiff in oral argument contends that the purpose of this type of advertising was to notify the public that it had listings of properties in particular areas. This explanation cannot be accepted. It is clear that Plaintiff's admittedly deliberate misrepresentation was solely for the purpose of entrapping desperate people seeking a place to live by enticing them as customers through false, unauthorized and misleading advertisements. Contrary to Plaintiff's pious protestations of principles necessary to free competition, Plaintiff would require Defendant to become an unwilling co-conspirator to mislead the customers of Defendant Providence Journal Company.

[1] Plaintiff first argues that Defendant Providence Journal Company violated § 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

In order for Plaintiff to succeed on this theory, it must necessarily establish that the Defendant Journal either combined or conspired in restraint of trade within the meaning of the Act. The record indicates however, and this Court finds

as a matter of law, that the Journal's action in rejecting Plaintiff's advertising and establishing its policy not to accept advertising from any rental referral firm who charged a fee to the prospective tenant does not violate § 1 of the Sherman Act.

[2] The purpose and policy of the Act is to preserve competition by eliminating conduct whose purpose or effect was to restrain or obstruct the course of trade.

> [I]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919).

[3, 4] The announcement of policy and simple refusal to deal, without more, is not barred by § 1. Section 1 bars concerted activity in the form of a combination or conspiracy to effectuate a policy in restraint of trade. Plaintiff alleges that the co-conspirators with Defendant Journal were the two firms who like Plaintiff charged a fee to tenants, the Board of Realtors, real estate brokers who complied with Defendant's policy, as well as the customers of both Plaintiff and Defendant. In substance, Plaintiff argues that their acquiescence in Defendant's policy, be it voluntary or involuntary, satisfies the collaboration requirement of § 1. The Court holds that it does not.

[5, 6] The facts establish that Defendant's actions were unilateral and fall squarely within the *Colgate* doctrine, as limited by later Supreme Court decisions. *See: Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80

S.Ct. 503, 4 L.Ed.2d 505 (1960); *Federal Trade Comm. v. Beech-Nut Packing Co.*, 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307 (1921). Defendant instituted a new policy and communicated it clearly to its readers and customers by means of a printed announcement in its advertising section. It then proceeded to adhere to its new policy as announced, but it employed no coercive or threatening means or other affirmative action prohibited by § 1 in order to secure compliance with its policy. The Court does not accept Plaintiff's argument that Defendant, by inviting readers to call if they were charged a fee, was utilizing a reporting system which constituted prohibited affirmative action. This Court must determine whether an unlawful combination is proved by judging what the parties actually did, rather than by the words they used. *United States v. Parke, Davis & Co.*, 362 U.S. at 44, 80 S.Ct. 503. Defendant Journal's conduct does not resemble the elaborate enforcement schemes which the Supreme Court found to be illegal combinations in both *Albrecht* and *Parke, Davis*.

[7, 8] Furthermore, "[i]t is not sufficient to merely allege acquiescence and thus claim a combination has been demonstrated." *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978) at 289. The Court must scrutinize the totality of circumstances which induced the alleged acquiescence after a simple policy announcement. Where the customer acquiescence was "based solely on the individual self-interest of the customer in continued dealings" with the Defendant, such acquiescence is not an agreement within the reach of the Sherman Act.

> This is true even though it is recognized that there is no difference in economic effect between adherence to a manufacturer's policy effected by prohibited agreement and adherence effected by conduct within the narrow safety zone offered by *Colgate*.

Ford Motor Company v. Webster's Auto Sales, Inc., 361 F.2d 874, 879 (1st Cir. 1966); *United States v. Parke, Davis & Co.*, 362 U.S. at 44, 80 S.Ct. 503. Plaintiff fails to establish the element of joint action and thus fails to sustain its § 1 claim.

[9] If Defendant Journal's conduct were viewed as satisfying the § 1 combination conspiracy requirement, which this Court expressly finds unsatisfied, Plaintiff fails to prove that the alleged combination does in fact unreasonably restrain trade. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918). Plaintiff's argument that Defendant's conduct should be regarded as illegal *per se* is without merit. The application of the *per se* rule which does not take into account the market power of the parties, the purpose of the restraint, or the legitimate business reasons for the practice, is limited to those practices which have a "pernicious effect on competition" which lack "any redeeming virtue." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

[10] Applying the more flexible Rule of Reason recently embraced anew by the Supreme Court in *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), a wide variety of factors are to be considered in order to determine legality. The inquiry must focus on a consideration of the impact on competitive conditions. *Standard Oil v. United States, supra*, 221 U.S. at 65, 31 S.Ct. 502. There is a total lack of evidence which remotely suggests the slightest impact on competitive conditions. The Plaintiff's contention that Defendant Journal's classified advertising is the only method of communicating with prospective tenants is patently absurd if what Plaintiff has in mind is attracting customers by so-called "tombstone advertising"; that is, advertising which proclaims the alleged virtues of Plaintiff's

service as opposed to advertising which relates to particular properties. Plaintiff ignores not only other methods of communication, radio, television, billboard, weekly newspapers, so-called shoppers' guides and throw aways, but has avoided totally any references to other sources of renter information such as real estate agents and indeed "For Rent" signs perched in vacant tenement windows.

Plaintiff's argument starts with the conclusion that classified advertising concerning the availability of potential rental properties is imperative to Plaintiff's success and then argues that in view of the extensive circulation of Defendant Journal's classified advertising, it must be considered to be a monopoly. This intellectual "bootstrapping" would enlarge the scope of Section 1 to the point where no businessman could refuse to deal.

Under the Rule of Reason analysis, the purpose of the arrangement is a serious consideration.

> The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, supra, 246 U.S. at 238, 38 S.Ct. at 244.

[11] The evidence in the record clearly shows and this Court finds that the Defendant's decision to reject Plaintiff's advertising and to institute its policy not to accept ads from fee-charging firms was not in any way intended to restrain trade or enhance Defendant's own position in the rental information market. Indeed, there is no evidence that Defendant's policy did anything other than reduce its advertising revenues. Rather, it was sound business judgment made at a financial sacrifice, intended to maintain a quality advertising

section for its readers. After receiving complaints from readers as to the quality of service Homefinder's was providing, and recognizing the obvious potential for abuse in other such firms, Defendant made a legitimate consumer-oriented decision to stop dealing with fee-charging firms.

[12] In substance, Defendant was primarily motivated by its legitimate concern that the ads it was publishing were injurious to the public in that they constituted a form of deceptive advertising. In view of the fact that unfair or deceptive acts or practices in commerce are unlawful under 15 U.S.C. § 45, it was certainly good business and ethical judgment for Defendant, believing Homefinder's ads to be deceptive, to discontinue its dealing with it. Plaintiff here is alleging serious anti-trust violations, yet the very foundation upon which those alleged violations rest was Defendant's refusal to participate in a potentially unlawful operation.[3] 15 U.S.C. § 45, although found in a different chapter than 15 U.S.C. § 1 and § 2, was designed to supplement and bolster the Sherman Act. Its very purpose was to eliminate unfair competition and practice which if left untouched would inevitably become the evils prohibited by the Sherman Act. *F. T. C. v. Motion Picture Adv. Co.*, 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426 (1953); *Fed. Trade Comm. v. Raladam Co.*, 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1931); *Butterick Pub. Co. v. Federal Trade Commission*, 85 F.2d 522 (2d Cir. 1936.)

Section 2 of the Sherman Act, 15 U.S.C. § 2, compliments the prohibition of combinations to monopolize forbidden by § 1 of the Sherman Act. Its thrust includes the prevention of unilateral action to attempt to obtain monopoly power or the actual aquisition of monopoly power. It is essential to this

[3] Plaintiff's suggestion that Defendant can edit untruthful copy or refer complaints to the proper regulatory authority, including the Federal Trade Commission, seeks to shift a burden to Defendant without justification.

aspect that a determination is made concerning what product and what market is at issue.[4]

In *Walker v. Providence Journal Company, supra,* the Court of Appeals stated that plaintiff had not demonstrated on the record, at that time, such a likelihood of success on the merits of its Section 2 claim that would have required the issuance of a preliminary injunction. In its opinion the Court of Appeals, in part, stated:

> This market presumably refers to the market for information about housing vacancies; we say presumably because plaintiffs have made no attempt to define the market, and have made no proof that the Journal has anything approaching a monopoly in it. Such careful definitions and proof are indispensable in antitrust actions.

Walker v. Providence Journal Company, supra, at 87. After a plenary trial, the circumstances remain the same.

Plaintiff's evidence is directed solely to the market for classified advertising in newspapers of individual properties for rent. In its effort to establish the product, Plaintiff has established that it supplies information to its customers concerning particular available rental properties. This is a service and is similar to the service which the Defendant provides to its readers in the classified section of its newspapers. As a consumer may obtain the information in the possession of Defendant concerning vacancies by purchasing its newpapers, a consumer can obtain the information in the possession of Plaintiff by paying it a fee.

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[4] Plaintiff's Pre-Trial Memorandum, P. 57, note 52 contends that this is an instance of use of monopoly power and therefore "a product and geographic market definition is not needed for the market upon which the restraint is being imposed," citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) note 59. Nothing in note 59 supports this contention or even remotely suggests it.

In spite of the observation of the Court of Appeals in this action that relevant market must be carefully defined and proof is indispensable, it is far from crystal clear exactly what the Plaintiff contends. Perhaps the best statement of its most recent contention is found in its proposed findings of fact, as follows:

> 28. The relevant geographic market for purposes of Plaintiff's Section II (sic) claim, is the Providence—Pawtucket—Warwick, Standard Metropolitan Statistical Area (P.P.W.—S.M.S.A.) A relevant geographic sub market is the Providence City Zone as designated by the Audit Bureau Circulation Reports.
>
> 29. The relevant product market for purposes of plaintiff's Section II (sic) claims are:
>
> a) Daily newspaper readership.
>
> b) Daily newspaper advertising.
>
> These markets are interdependent and comprise the daily newspaper market.
>
> 30. Daily newspapers are a distinct and separate product market from all other forms of advertising media.

Plaintiff contends that because of Defendant's policy, it is denied access to the relevant daily newspaper advertising market, and that Defendant possesses this power of elimination due to its "... 'strategic dominance' over the daily newspaper market and that it possesses monopoly power in the daily newspaper market in the relevant geographic areas." (Reply Memorandum of Plaintiff, Page 6).

Plaintiff contends both a vertical and a horizontal effect of the Defendant's policy, i.e. horizontal in the sense that the effect of the policy is to preserve the Defendant's position as a distributor of rental information from competition, and vertical in the sense that all rental referral firms are eliminated from the marketplace.

Plaintiff argues three theories "of monopolization":

(1) Unlawful use of monopoly power in readership to foreclose competition in the marketplace;

(2) Bottleneck analysis; and,

(3) Unlawful use of monopoly power in advertising to foreclose competition in the marketplace.

Plaintiff argues as its first theory that Defendant has used its monopoly power in readership to foreclose competition in the marketplace, citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Griffith*, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948); and *Gamco Inc. v. Providence Fruit & Produce Building*, 194 F.2d 484 (1st Cir. 1952).

Plaintiff argues as its second theory that the denial of access to a "scarce facility" necessary for competition is a violation of Section 2 as the creation of a bottleneck impeding the free flow of commerce.

The third string to Plaintiff's argumentative bow is the contention that Defendant's use of monopoly power in advertising denies competitors a marketplace.

Additionally, Plaintiff argues an "attempt to monopolize" by eliminating all rental referral firms from competition with Defendant's marketing system.

Lastly, Plaintiff argues that the only justification defense available to Defendant is that "physical limitations" compel Defendant to choose between competitors.

The breadth and sweep of Plaintiff's arguments have a tendency to produce a breathless state of mind which requires a step backward to place this controversy in manageable perspective. Put in less complex and more easily understood terms, the Plaintiff argues that Defendant has a duty to publish Plaintiff's advertisements, irrespective of content, in order that Plaintiff may operate its business at the least ex-

pense and with the greatest possible gain. Otherwise Defendant is guilty of what Plaintiff calls "monopoly action."

Plaintiff does not argue "that the Defendant Providence Journal Company unlawfully acquired monopoly power in the daily newspaper market. On the contrary, the more likely conclusion is that the Defendant is 'a natural monopoly in the relevant market.' "

[13] The test of violation of Section 2 of the Sherman Act is two-fold: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or a historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). *See also: Kansas City Star Company v. United States*, 240 F.2d 643, 660 (8th Cir. 1957); *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960); *Cole v. Hughes Tool Company*, 215 F.2d 924 (10th Cir. 1954). Twenty-five years ago, the Supreme Court pointed out that at that time only eight percent of daily newspaper cities enjoyed the clash of opinion which competition among publishers of the daily press could provide and that "... daily newspaper competition within individual cities has grown nearly extinct." *Times-Picayune v. United States*, 345 U.S. 594, 603, 73 S.Ct. 872, 877, 878, 97 L.Ed. 1277 (1953).

It is the nature of the business that the dominant cause of newspaper monopoly is "efficiencies of large circulation size." *Monopoly in the Daily Newspaper Industry*, 61 Yale L.J. 948, 1005 (1952). Further, the local reader who has an interest in local events will not have that interest satisfied by an out-of-town newspaper. The circulation statistics introduced by Plaintiff fully support these observations.

In those communities, Pawtucket-Central Falls, and Woonsocket, Rhode Island, and Attleboro, Massachusetts, communities located in the Providence-Pawtucket-Warwick

S.M.S.A., and in which local daily newspapers are published, the Defendant is at a competitive disadvantage. This is also true with respect to some communities adjacent to Pawtucket-Central Falls, Woonsocket and Attleboro, e.g. Lincoln, Burrillville, Cumberland, North Smithfield, Rhode Island, and North Attleboro, Norton, Plainville, Blackstone and Millville, Massachusetts. The circulation advantage of the Defendant has the appearance of what one of Plaintiff's witnesses characterized, in another context, as a "swiss cheese" effect. In all of the other communities located in the Providence-Pawtucket-Warwick, S.M.S.A., Defendant has a circulation advantage with an advantage of 152,379 to 5846 in the Providence City Zone so-called, consisting of the communities of Providence, Cranston, East Providence, North Providence, Johnston, Barrington, Bristol, Warren, Warwick, West Warwick and East Greenwich, Rhode Island. Furthermore, by limiting the geographic area to the Providence-Pawtucket-Warwick S.M.S.A., or as a submarket, the Providence City Zone, so-called, the Plaintiff has eliminated the competitive effect of the two daily newspapers published in the southern part of the State of Rhode Island, in the communities of Newport and Westerly. This omission is significant in that although editions of Defendant's newspaper are specially published for those areas, and the Defendant's daily newspapers are sold there, it is at a distinct competitive disadvantage. The same observations can be made concerning the Fall River, Massachusetts area.

[14] It is only in the so-called Providence City Zone that it can be said that Defendant has "strategic dominance" of the daily newspaper market. This is a geographic area with the City of Providence at its center and adjacent communities in a rough semi-circle extending from East Providence on the east, southerly along both sides of Narragansett Bay and westerly and northerly to North Providence, all within the

State of Rhode Island, and constituting only a portion of the Providence—Pawtucket—Warwick S.M.S.A. However, there is no evidence to support in any fashion the contention that this area is an existing submarket for renter information.

Furthermore, there is no evidence that Defendant maintains monopoly power. There is no evidence to establish the basic premise of Plaintiff's contention upon this branch of the argument, i.e., that Plaintiff controls the renter information market. As previously stated, other methods of obtaining information concerning rentals were ignored by Plaintiff, but this Court may not be so oblivious to the economic facts of life. It is a fact that Defendant sells more newspapers than other newspapers published in certain areas of the State of Rhode Island. This fact is a considerable step away from the bald unsupported conclusion asserted by Plaintiff that, therefore, it possesses monopoly power with respect to renter information.

Plaintiff's Complaint is denied and dismissed. Judgment will enter for Defendant Providence Journal Company for costs.

SO ORDERED.

HOMEFINDERS OF AMERICA, INC.,
Plaintiff, Appellant,

v.

PROVIDENCE JOURNAL COMPANY et al.,
Defendants, Appellees.

No. 79-1396.

United States Court of Appeals,
First Circuit.

Argued Feb. 6, 1980.

Decided March 26, 1980.

As Amended on Motion for Correction or
Modification of Opinion April 22, 1980.

Franchisee whose business consisted of selling listings of properties available for rent brought antitrust action against newspaper. The franchisor was joined as plaintiff and the United States District Court for the District of Rhode Island, Francis J. Boyle, J., 471 F.Supp. 416, dismissed. The Court of Appeals, Aldrich, Senior Circuit Judge, held that the newspaper did not violate the Sherman Act when it refused to run admittedly deceptive classified advertisements submitted by the franchisee.

Affirmed.

Ralph J. Gonnella, Providence, R.I., for plaintiff, appellant.

Joseph V. Cavanagh, Jr., with whom Knight Edwards, John D. Deacon, Jr. and Edwards & Angell, Providence, R.I., were on brief, for defendants, appellees.

Before ALDRICH and BOWNES, Circuit Judges, KEETON, District Judge.*

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* Sitting by designation.

ALDRICH, Senior Circuit Judge.

This is an action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, brought initially by one Walker, a franchisee of Homefinders of America, Inc., against Providence Journal Co., publisher of a daily metropolitan newspaper. Homefinders later was joined as plaintiff, *see Walker v. Providence Journal Co.*, 1 Cir., 1974, 493 F.2d 82, and is now the sole plaintiff remaining. Plaintiff alleges that on and after February 1, 1973, defendant unlawfully refused to run classified advertisements desired by Walker, causing him financial loss and ultimately to go out of business and preventing plaintiff from re-establishing a Rhode Island franchise. The case was tried to the court. After extensive findings the court dismissed the action. *Homefinders of America, Inc. v. Providence Journal Co.*, D.R.I., 1979, 471 F.Supp. 416. We affirm.

Walker's business consisted of selling to individual customers, for an advance fee, listings of properties available for rent in his area, and in any requested areas where plaintiff had other franchises. Plaintiff agreed to furnish such listings and to provide Walker with assistance, information, and advice in return for a percentage of his gross receipts. Walker's own lists were comprised of properties listed with him by prospective landlords, plus others of which more will be said later. No fee was charged to the landlords. Walker did not participate in any rental negotiations, nor did he receive any commissions; his sole activity was the sale and maintenance of lists. His advertisements, however, were ostensibly of individual but insufficiently identified properties, seemingly no different from the usual classified advertisement relating only to the property mentioned. A reader responding to Walker's advertisement was apt to learn, however, that the property was not available, and, in any event, that he would have to pay a fee for further information. The court found,

"In mildest terms, the nature of Plaintiff's advertising is misleading. It sought to notify the public, not of the qualities and virtues of its service, but of the alleged availability of particular properties. At first blush, this seems to be inconsistent with Plaintiff's own interest, since the commodity which it had for sale was information concerning the availability of certain properties which would be disclosed only upon the payment to Plaintiff of its fee. In fact, the purpose of this advertising eminently served Plaintiff's purpose. It inserted advertisements which were calculated to attract an unusual degree of attention, indicating that properties were available for rent under circumstances that were, to say the least, unusual. For example, its advertisements stated that children and pets were welcome, utilities were paid and automobile parking was available. Complaints concerning this type of advertising establish without doubt that it is what has been called 'bait' advertising. When the prospective tenant called the listed telephone number, it turned out to be Plaintiff's telephone and the exuberant prospective tenant was told that the property advertised was no longer available but if the prospective tenant would merely come to Homefinder's Office and pay the fee of $20, other listings would be made available. In some instances, it is admitted, properties were advertised by Plaintiff without the knowledge or consent of the owner, and in terms quite different from those which the owner had in mind.

"Plaintiff in oral argument contends that the purpose of this type of advertising was to notify the public that it had listings of properties in particular areas. This explanation cannot be accepted." 471 F.Supp., ante, at 420.

In its brief, plaintiff makes two responses.

> "The District Court's reference to 'bait' advertising suggests an illegal practice when in fact it is a common advertising technique, particularly for employment agencies. The District Court makes it appear *all* of Walker's advertising were fictitious when there is no such evidence in the record."

What percentage was fictitious is irrelevant. The testimony of the manager of defendant's classified advertising department was that the continual complaints, including some from the Better Business Bureau, were so numerous that they had to be specially channelled to him.

The general truth of defendant's objections plaintiff concedes.

> "Plaintiff . . . on this appeal will not attempt to refute or even defend allegations that it has engaged in deceptive or misleading practices. Plaintiffs will even concede, for purposes of this appeal, that the conduct of plaintiff's former franchise may have been one motivating factor in the adoption of defendant's rental referral policy."

Plaintiff apparently felt comfortable in this concession because of the general principle that an antitrust violator cannot set himself up as a regulator and justify his own conduct by asserting improper behavior by the injured party. *See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 1968, 392 U.S. 134, 138-40, 88 S.Ct. 1981, 20 L.Ed.2d 982; *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n*, 1941, 312 U.S. 457, 467-68, 61 S.Ct. 703, 85 L.Ed. 949. We do not question this principle, but plaintiff over-applies it. Defendant is not permitted to act as a protector of the public, but it may protect its own property from direct injury. In this sense plaintiff's concession is suicidal.**

** Plaintiff attempts to back away from this concession in its reply brief. Not only was the concession well founded, however, but after one trip to this court, *see Walker*, ante, and an extensive opinion by the district court, we are not impressed by such a change of posture, either as a tactic or in fact.

[1] To disregard the many trees in the briefs of both parties and look at the forest, plaintiff is demanding that a newspaper, whose First Amendment rights in this area are not to be ignored, *see* post, publish advertisements whose misleading nature has drawn the justified criticism of its readers. The court found that the establishment of defendant's policy was motivated by customer complaints. The depth of that motivation establishes its relevancy. Although the district court findings erroneously dwelt in part on the propriety of defendant's conduct in protecting the public, the court also found that defendant's reasons for refusing the advertisements were to avoid being charged with participation in deceptive acts or practices, and "to maintain a quality advertising section for its readers." *Homefinders*, ante, 471 F.Supp. at 423. We could not label such findings plainly wrong; indeed, they seem plainly right.

The fact that defendant may have a monopolistic position does not mean that competitors, assuming plaintiff to be such, can require it to immolate itself. Monopoly or no, the Sherman Act is not aimed at reasonable conduct, and it is not unreasonable for a newspaper to refuse misleading advertising that offends its readers and could turn them away from its classified columns altogether. The quality of Walker's advertisments was even more directly damaging to defendant's reputation than is likely in the customary dilution case. *E.g., Tiffany & Co. v. Boston Club, Inc.*, D.Mass., 1964, 231 F.Supp. 836, 843-44; *Bulova Watch Co. v. Stolzberg*, D. Mass., 1947, 69 F.Supp. 543. Defendant was free to refuse to deal with a party who so lowered the standards of its advertising. *See Byars v. Bluff City News Co.*, 6 Cir., 1979, 609 F.2d 843, 862-63; *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 1 Cir., 1952, 194 F.2d 484, 487-88, *cert. denied*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 ("possibly low business or ethical standards"); *America's Best Cinema Corp. v. Fort*

Wayne Newspapers, *Inc.*, N.D.Ind., 1972, 347 F.Supp. 328, 333-34. Plaintiff fails to distinguish between illegally attempting to maintain a monopoly position and protecting one's assets. *Otter Tail Power Co. v. United States*, 1973, 410 U.S. 366, 380-82, 93 S.Ct. 1022, 1030, 35 L.Ed.2d 359, *Byars*, ante, 609 F.2d at 863 & n.55; *International Railways of Central America v. United Brands Co.*, 2 Cir., 1976, 532 F.2d 231, 239-40. The point at which per se conspiracy principles might overtake concerted prophylaxis is not before us; there is no merit in plaintiff's criticism of the court's finding that defendant's actions were unilateral.

In this circumstance plaintiff claims that defendant's policy would result in the rejection of advertising by anyone who required the prospective tenant to pay a fee in order to obtain rental information, even if that fact were disclosed. If that is so, it is irrelevant. While ultimately Walker may have been willing to state that the tenant would have to pay a fee, he did not correct the other misleading aspects which engendered readers' complaints. Prior to defendant's ultimate decision of February 1973, defendant had already once suspended the publication of Walker's advertisements because of readers' complaints. When defendant permitted resumption, Walker continued as before. Plaintiff's present claim is that defendant should have policed Walker's advertisements, "edit[ed] advertising copy and/or place[d] advertisements in the newspaper in such a way as to insure truthful disclosures." Even apart from the manifest expense to defendant of such a procedure, this suggestion is little short of absurd—the advertiser should do his own policing. Plaintiff's contention, moreover, is peculiarly inappropriate with regard to its own situation. In *In the Matter of Rentex, Inc. T/A Homefinders of America*, 87 F.T.C. 1340 (1976), the Federal Trade Commission, impressed by the misleading character of plaintiff's advertising elsewhere, filed a complaint charging practices

asserted in the present case. Following a consent order that there should be no such conduct in the future, other than what might occur accidentally and non-negligently—as to which plaintiff was required to police itself constantly—plaintiff elected to abandon the referral business altogether. Plaintiff was not interested in a cleaned-up act. Counsel's contentions bear little relation to the facts.

[2] Nor are we moved by plaintiff's attempt to piggy-back on the rights of other parties—none of whom complained—allegedly faced with a policy not to publish even those advertisements which involved no misleading. Plaintiff argues that as the "victim of the anti-competitive policy imposed by the defendant Journal he (sic) can sue those who have combined to effectuate the restraint not only to vindicate his (sic) own interest but as a surrogate attorney to vindicate the public wrong." Plaintiff was not victimized by a restrictive advertising policy. It cannot proceed entirely vicariously, *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 1977, 429 U.S. 477, 96 S.Ct. 1101, 47 L.Ed.2d 311; *GAF Corp. v. Circle Floor Co.*, 2 Cir., 1972, 463 F.2d 752, *cert. denied*, 413 U.S. 901, 93 S.Ct. 3058, 37 L.Ed.2d 1045, particularly when no supposed beneficiary of its endeavors is present in the case. We add that plaintiff's continued pressing for an injunction in spite of the well supported finding that it has no bona fide intent to resume doing business in Rhode Island requires no comment.

In conclusion, we observe that for anyone who charges for rental information but advertises without disclosing the hook, it is not only easy, but highly tempting to use artificial bait. Such bait can be made more attractive; furthermore, the fish cannot steal it. Even when it might lack proof of actual fraud, we would hesitate long before holding that a newspaper, monopoly or not, armed with both the First Amendment and a reasonable business justification, can be ordered to

publish advertising against its will. *See Associates & Aldrich Co. v. Times Mirror Co.*, 9 Cir., 1971, 440 F.2d 133, 135-36; *J. J. Gordon, Inc. v. Worcester Telegram Publishing Co.*, 1961, 343 Mass. 142, 177 N.E.2d 586; *cf. Miami Herald Publishing Co. v. Tornillo*, 1974, 418 U.S. 241, 258, 94 S.Ct. 2831, 2839, 41 L.Ed.2d 730. In the present case we see no question. "The antitrust laws are not a shield for deceptive advertising." *Staff Research Assocs., Inc. v. Tribune Co.*, 7 Cir., 1965, 346 F.2d 372, 374.

Affirmed.